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STANDING COMMITTEE **Law and National Security**
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## Law and National Security 1984: The Year in Review

Over the past year *Intelligence Report* has carried many important articles. To summarize them all in the limited space available, however, would be to present our readers with a meaningless shorthand report. We have therefore exercised editorial discretion in selecting for summarization those articles which dealt with matters having the greatest impact or potential impact on the national security.

In each instance, in case the reader is interested, we have indicated which issue of *Intelligence Report* the summary is based on.

### Congress Votes FOIA Relief for CIA

After a long drawn-out debate, Congress, during the latter part of September 1984, approved H.R. 5164, a bill which grants partial relief from FOIA to the CIA by exempting "operational files" from automatic search and review in response to FOIA requests. "Operational files" are defined to cover most records of the Directorate of Operations, many records of its Directorate of Science and Technology, and some records of its Office of Security. All other CIA records will continue to be subject to FOIA requests.

The House vote was 369-36. Despite differences between the bills passed by the Senate and the House, Senate leaders assured speedy final enactment, without a conference, by accepting H.R. 5164 as passed by the House. Senate passage was unanimous on September 28.

This legislation reflects long efforts by the ABA, Congress, and concerned federal officials, both present and former. In August 1983, the ABA, after hearings and floor debate, went on record favoring significant relief from FOIA for foreign intelligence agencies. John Norton Moore, chairman of the Standing Committee on Law and National Security, and committee member John H. Shenefield, former associate attorney general, both testified in support of the legislation in the Senate hearings, and Mr. Shenefield again testified for the ABA during House hearings.

The president signed H.R. 5164 into law on October 15.

Under the new law, judges will have more limited jurisdiction. While the old rules of judicial review remain in effect for non-operational files, in the case of operational files, judges will be limited to deciding whether the files in question have been properly labeled.

The measure as passed had an unusual spectrum of support, including the ABA, the CIA, and the ACLU. The CIA obviously would have preferred a bill that would have removed a few more of the FOIA knots. The ACLU would have preferred a few more knots. But in the end everyone appeared satisfied.

(Based on article in October *Intelligence Report* by Robert L. Saloschin.)

### Senate Vote Approaches Ratification of Genocide Convention

The January breakfast meeting of the Standing Committee on Law and National Security was addressed by Ambassador Max Kampelman, a member of the committee. Ambassador Kampelman, who spoke on his return from negotiations with the Soviets at Madrid, said that the ratification of the Genocide Convention would enhance his bargaining position and that of other U.S. diplomats, and, conversely, that failure to ratify it would complicate their position.

On September 5, the State Department announced that after "an extensive review" of the Genocide Convention and "at the strong urging of the American Bar Association and other interested groups, the president concluded that it would be in the nation's best interest for the United States to ratify the Genocide Convention."

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In a speech made less than 24 hours later, President Reagan said that his administration would "vigorously support, consistent with the United States Constitution, the ratification of the Genocide Convention.... I want you to know that we intend to use the convention in our efforts to expand human freedom and fight human rights abuses around the world."

Announcement of the president's decision was greeted "with enthusiasm" by John C. Shepherd, the president of the American Bar Association.

Events moved rapidly after the president's statement. On September 12 hearings were held before the Senate Committee on Foreign Relations. The treaty was approved by a 17-0 vote (with Senator Jesse Helms, R-N.C., voting present).

On October 10, the full Senate devoted six hours to the consideration of the Genocide Convention. Only a few senators offered opposition, but because it was obvious that they had the power to delay proceedings at a very critical time, Senator Chris Dodd (D-Conn.), with the co-sponsorship of Majority Leader Baker, offered the following resolution:

> *Resolved,* That the Senate hereby expresses its support for the principles embodied in the Convention on the Prevention and Punishment of the Crime of Genocide, signed on behalf of the United States on December 11, 1948 (Executive Order, Eighty-first Congress, first session), and declares its intention to act expeditiously thereon in the first session of the 99th Congress.

On the following day, October 11—less than a day before the Senate adjourned—the Dodd resolution was approved 87-2. Senators Symms and East were the sole dissenters.

As the result of the administration's backing and the overwhelming bipartisan support for the measure, the Genocide Convention is expected to be one of the first things the 99th Congress will consider.

(Based on articles in September and October *Intelligence Reports* by Craig H. Baab.)

### El Salvador and Central America

On January 11, 1984, the Kissinger Commission submitted its long-awaited report on Central America. Despite original conservative misgivings about the inclusion of two prominent members of the Hispanic-American community, Mayor Henry G. Cisneros of San Antonio and Carlos F. Diaz-Alejandro, Professor of Economics at Yale University, the Commission concluded unanimously

> that the security interests of the United States are importantly engaged in Central America; that these interests require a significantly larger program of military assistance, as well as greatly expanded support for economic growth and social reform; that there must be an end to the massive violation of human rights if security is to be achieved in Central America; and that external support for the insurgency must be neutralized for the same purpose.

The report warned that—

> No Marxist-Leninist "popular front" insurgency has ever turned democratic *after* its victory. Cuba and Nicaragua are striking examples. Regimes created by the victory of Marxist-Leninist guerrillas become totalitarian. That is their purpose, their nature, their doctrine, and their record.

Considering the strategic implications for the United States, the Commission concluded:

> The present level of U.S. military assistance to El Salvador is far too low to enable the armed forces of El Salvador to use these modern methods of counter-insurgency effectively. [A 10 to 1 advantage is the generally required ratio of government forces to insurgents. It's about 4 to 1 now.]

Warning against "the tendency in some quarters of the Salvadoran military towards brutality," the Commission said that this

> magnifies Congressional and Executive pressures for further cuts in aid, and reductions in aid make more difficult the pursuit of an enlightened counter-insurgency effort.

The Commission, which was widely viewed as a major success for bipartisanship, called for periodic reports to Congress on the state of human rights in El Salvador.

On May 6, 1984, there took place the presidential runoff election in El Salvador. By arrangement with the government of El Salvador, the U.S. sent a 24-man delegation to observe and report on the election. The delegation, under the co-chairmanship of Senator John H. Chafee (R-R.I.), Ambassador Max M. Kampelman, and Representative G.V. (Sonny) Montgomery (D-Miss.), included 10 members of Congress and 14 private sector observers. (John Norton Moore, chairman of the Standing Committee on Law and National Security, was one of the private sector observers.)

The observer delegation concluded:

> It is our consensus that this election was fair and honest, and that it provided a clear and undeniable mandate to whichever candidate is elected to begin to grapple with the manifold problems that confront this country after five years of turmoil and unrest....

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## Commentary

**The GCHQ Case** (Continued)

*By Walter Pforzheimer*

The October 1984 issue of *Intelligence Report* carried a commentary on the court case arising out of British Prime Minister Thatcher's ban on unions in the Government Communications Headquarters (GCHQ), including all of its installations at home and abroad. To recap briefly, Mrs. Thatcher's ban, which was announced in Parliament in January 1984, was based on royal prerogative which had produced the Civil Service Order in Council, 1982. Some nine civil service unions took the ban to court, and, on July 16, Mr. Justice Glidewell of the Queen's Bench Divisional Court upheld the government on four of the five points before him. On the fifth point, Mr. Justice Glidewell found the ban to be invalid, because "Fairness and the rules of national justice required that it should not finally be made" without any consultation with GCHQ staff or their unions. Glidewell added one interesting comment: "I see no reason in logic or principle why the exercise by a minister of a power conferred by an order in council should not be subject to the same scrutiny and control by the courts as would be appropriate to the exercise of the same power if it had been granted by statute." The government appealed the adverse portions of the Glidewell opinion to the Court of Appeal.

On August 6, 1984, the Court of Appeal issued its opinion in the case, *[Regina v. Secretary of State for the Foreign and Commonwealth Office and Another, Ex parte the Council of Civil Service Unions and Others]*, unanimously upholding all of the government's contentions. The opinion was based largely on the national security interests involved in GCHQ, of which "the ministers are the sole judges." The unions were authorized to appeal to the House of Lords, which rendered its opinion on November 22, dismissing the appeal. Five Law Lords each rendered an opinion, the most detailed of which was by Lord Fraser of Tullybelton.

Lord Fraser began by noting that the union disruptions at GCHQ had been taken "mainly in support of national trade unions" when the latter were in dispute with the government on general civil service matters, and were not about local problems in GCHQ. As had the courts below, Lord Fraser cited union literature which had proclaimed the importance to the unions of disruptions at GCHQ. Lord Fraser described one incident in which a subordinate of a former director of GCHQ tried to explain to the general secretary of one of the unions the serious consequences of disruptive action on GCHQ work. The reply was: "Thank you. You are telling me where I am hurting Mrs. Thatcher the most." His Lordship went on to say that:

> The decision on whether the requirements of national security outweighed the duty of fairness in any particular case was for the government and not for the courts; the government alone had access to the necessary information, and in any event the judicial process was unsuitable for reaching decisions on national security.

The four other Law Lords all concurred on voting to dismiss the appeal on national security grounds.

However, all five Law Lords took up the question of judicial review of orders in council which had been raised by Mr. Justice Glidewell below and had also been briefly touched on in the Court of Appeal. Their language signalled difficulties ahead if national security type information were not involved. Lord Fraser considered that "The most important and difficult question raised by the appeal concerned the royal prerogative." The government's position was that prerogative powers were discretionary, and the way in which they were exercised was not open to judicial review. Lord Fraser conceded that the weight of "the authorities" bore this out. Had the present case merely involved the power to regulate civil service, "there was no obvious reason why the mode of exercise of that power should be immune from review by the courts," although this would run against the great weight of authority. For this reason, Lord Fraser preferred to leave that question open until it arose in a case where decision on it was required (i.e., where national security was not involved).

On another element of the case, Lord Fraser considered whether the power conferred under the order in council was subject to an implied obligation to act fairly. He saw no doubt that, had the order in council been made under the authority of a statute, judicial review would have been applicable. His Lordship "was unable to see why the words conferring the same powers should be construed differently merely because their source was an order in council made under the prerogative," provided that national security did not require otherwise. Absent national security, Lord Fraser felt that the failure to consult the unions and staff in the present case "would have been unfair."

Lord Scarman gave it as his belief "that the law relating to judicial review had now reached the stage where it could be said with confidence" that if the subject matter were one on which courts could rule, "the exercise of the power was subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power." He said that the old limitations on review of the prerogative power had now been "overwhelmed by the developing modern law of judicial review." He felt that the major question in the present case was its subject matter, which is why he would dismiss the appeal on the sole ground of national security.

In somewhat the same vein were the views of Lord Diplock and Lord Roskill. The latter offered an inter-

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esting touch in saying that failure to note the changing times anent the sovereign's absolute power was like "harking back to what Lord Atkin had once called, in a different context, the clanking of medieval chains of ghosts of the past."

Thus "national security" certainly saved this case, nor does their Lordships' language indicate that their views would change in cases where national security would be overriding. But on the general principle of judicial review of the royal prerogative and orders in council, absent the national security issue, warning flags seem to have been raised.

## Book Review

**Too Secret Too Long** by Chapman Pincher, St. Martin's Press, New York, $19.95.

*By the Editor*

This meticulously researched book about the ups and downs (mostly downs) of British intelligence is both fascinating and quintessentially depressing. Authored by Chapman Pincher, the dean of British investigative reporters on defense and intelligence matters, it has two major themes and a number of sub themes, all interconnected and exhaustively developed.

The first major theme the author advances is that Sir Roger Hollis, the head of MI5 (the equivalent in Britain of our FBI) from 1957 to 1965, was in fact a Soviet spy and had been ever since entry into the service in 1938. Pincher constructs his case with all the care that Pythagoras must have lavished on the development of the Pythagorean theorem. The only difficulty this lawyer reviewer has with the author's chain of circumstantial evidence is that the square of the intelligence hypotenuse doesn't quite add up to the square of the other two sides of the right-angled triangle. Something more is needed to "prove" the case such as access to Soviet files (don't wait) or another defector who had such access or a parliamentary debate on Hollis which would probably be least probative.

Two other lawyers, Furnival Jones and Anthony Simpkins, the director and deputy director general of MI5 respectively, reviewed the evidence against Hollis in 1972 and reached a similar "not proved" verdict, but Pincher dismissed their judgment, as he probably would mine, in these words:

> It was, perhaps, no coincidence that both Furnival Jones and Simpkins had been trained as lawyers and in that context the words of R.H.S. Crossman, the Labour politician who had been involved with wartime, are apposite: "The essence of security is to make up one's mind without the evidence because if one waits for the evidence it is too late. Lawyers, because of their great regard for evidence, are not necessarily the right people to form opinions about spies...." On that score they may not be the right people to run a security agency. [Bill Casey and Judge Webster please note!]

It is extremely difficult to unearth a mole in an intelligence organization. It's like trying to determine if an oak tree, sound to the eye on the outside, has termites at the core. No forester I ever met can tell without cutting down the tree and examining it from bark to the center, and that's what Pincher would like to do with MI5 and MI6.

Hollis, according to Pincher, was probably recruited to the Soviet cause during his nine years in China as a part-time journalist and employee of the British American Tobacco Company. He points the finger at communists Hollis met during that sojourn such as the notorious Agnes Smedley, Arthur Evert, Victor Sorge, and a dedicated lady agent, code named Sonia, who spread her sexual favors across the ideological spectrum. Sonia became, says Pincher, one of the most successful female spies in history and was probably posted to England to become Hollis's controller.

Oddly enough, I met Hollis in Shanghai in 1933, first in the office of the B.A.T. and then at various parties in that then gay Paris of the Far East. It was aptly described by Pincher as having "a night life which gave the city a scandalous reputation." It never occurred to me at the age of 22 that Hollis might be a Soviet spy. I just categorized him as a stuffed shirt!

Hollis is not the only (potential?) spy I failed to recognize as such and whose perfidy is revealed in *Too Secret Too Long*. In. 1982, an inspection trip was arranged for me to evaluate the strategic Simonstown dockyard and the Silvermine intelligence center outside Capetown—or so I thought! My official host was the same Commodore Dieter Gerhardt (not commander as Pincher ranks him) who had been a paid spy for the Soviets for over 20 years. He and the commodore in charge at Silvermine were very polite and even took me to lunch at the Kirstenbosch Botanical Gardens. But they never showed me anything but empty rooms—a fact I duly reported to intelligence on my return to Washington, without, however, suggesting anything except that Commodore Gerhardt kept me from learning much about Simonstown! And all the while he was selling the Silvermine commodore's secrets. What a strange luncheon gathering it was.

Author Pincher is absolutely right that it takes an ongoing counterintelligence organization to sniff out every suspicion even if it leads to the senior engineering officer in the South African navy who sold everybody's secrets he could get his hands on, including ours and Great Britain's. And that organization must not be in-

hibited or prohibited from the top. According to all accounts, it was such an organization, Israel's Mossad, which first suspected Commodore Gerhardt and his wife and followed them all the way to the Bolshoi in Moscow via London and Vienna. Apparently he made the mistake of leaking an Israeli secret. Both of the Gerhardts are now in jail—he for life—and South Africa is reported to be looking into its counterintelligence efforts, just as Chapman Pincher is urging his country to do.

There are many more sickening examples of the damage wreaked by moles in British intelligence. An outstanding one is the Prime case which the author calls "GCHQ's Billion Dollar Spy" (see Chapter 55 and *Intelligence Report* for December 1983). The Security Commission's report on the Prime case disclosed the most appalling deficiencies in this most secret of British installations, all of which Pincher comments upon. Chief among them were the failure of the positive vetting system, the lack of physical security so Prime could take out highly classified material at will, union slow downs and strikes, and no use of the polygraph.

The author commends the report and recommendations of the Security Commission in the Prime case. He is the first journalist in England that I have seen to endorse the use of the polygraph. But, he points out, Security Commission reports are backward looking. In addition to the use of the polygraph and the training of MI5 agents in its use, Pincher wants *forward* looking oversight of intelligence operations, and that is the second major theme of *Too Secret Too Long*.

After almost every chapter, Pincher advocates and champions the use and lauds the potential value of oversight of intelligence activities. At one point he relates, quoting confidential American sources (about one-third to one-half of his footnotes cite confidential sources):

> I have been assured that, to date, the benefits of oversight have outweighed any disadvantages and that the services themselves now favour it, if only because it spares them from unfounded criticism.

Let me say to Mr. Pincher that oversight is not, as they say in his country, "all beer and skittles." I am sending him an article and a column by a retired CIA employee which appeared in the *Washington Post* on January 2 and which describes the pitfalls and pratfalls our oversight procedures have brought to the American intelligence community. How our intelligence oversight mechanism would fit into the British parliamentary system is not for an American to say. The prescription for Britain is given by the author at pages 586-87, but again the whole oversight process is a "sticky wicket" on both sides. I think our oversight procedures should be more closely examined by the author before he tries to transplant them to a similar but different political system. He needs to do more investigation into our many oversight bodies and perhaps even write another book or article on the subject.

Let me conclude by saying this is an important book, perhaps the most important ever written about the strengths and weaknesses of world intelligence systems. It should be read by all who teach or are merely interested in intelligence.

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> Three successful elections in two years are a clear repudiation of the insurgency. The people of this country have declared themselves in favor of the democratic process. The delegation calls upon all Salvadorans, including members of the armed opposition, to heed the message of this election.

(Based on articles in April and July *Intelligence Reports.*)

### Administration Reports On Soviet Arms Control Violations

On October 10, the administration released to Congress, pursuant to congressional amendments to the fiscal 1985 Defense Authorization Bill, a report on Soviet violations of treaties and declarations bearing on arms control and disarmament. The report was prepared by the bipartisan General Advisory Committee on Arms Control and Disarmament, which had been studying the subject for more than three years.

The report substantially increased the number of named violations—still holding in reserve a large number of violations which were not listed in the declassified version given to Congress and the public.

The report is the first comprehensive United States study of all Soviet practices under arms control obligations since World War II. It studied 26 documentary agreements along with numerous unilateral Soviet commitments. The committee noted that in most cases of alleged Soviet violations, the Soviets readily could have shown that the allegations were false—if they had been false. In summing up its findings, the committee said:

> The Committee has determined that the Soviet Union's practices related to about half of its documentary arms control commitments have raised no questions regarding compliance. Soviet practices related to the other half, however, show material breaches—violations, probable violations, or circumventions—of contractual obligations.

Among the Soviet violations made public by the president's message to Congress, it was noted that—

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• The Soviets had breached the unilateral commitment not to send offensive weapons to Cuba, thus precipitating the Cuban missile crisis in 1962.

• In return for a U.S. agreement not to invade Cuba, the Soviet Union had committed itself not to base offensive weapons in Cuba. Despite this, from 1970 to 1974 the Soviets had deployed and tended nuclear weapons submarines in Cuban waters.

• The Soviets had violated the Geneva Protocol of 1925 prohibiting the use of chemical and toxin weapons, and had violated the Biological Weapons Convention of 1972 by continuing to produce, store, transfer, and use such weapons up to the present time.

• The Soviet Union had systematically violated the provisions of SALT I (agreement) barring the use of concealment and missile test encryption to impede verification of compliance by national technical means.

• The Soviets had violated the ABM treaty by building a massive phased array radar system at Krasnoyarsk in Siberia, which makes sense only in the context of a national ABM system.

In concluding its report, the General Advisory Committee said:

> The Committee found recurring instances of Soviet conduct involving deliberate deception, misdirection, and falsification of data during negotiations....
>
> The development of means to safeguard the U.S. against Soviet non-compliance is essential if the arms control process is to avoid being further undermined, if it is to have favorable long-term prospects, if it is to build trust among nations, and if it is to contribute to U.S. national security and the cause of peace.

(Based on article in November *Intelligence Report.*)

### Attorney General Smith Charges Communist Disinformation, Drug Activities Violate Rule of Law

*Editor's Note: We do not oridinarily review speeches in our annual report, once we have excerpted from them in our monthly* Intelligence Report. *The speech made before the American Bar Association by Attorney General William French Smith on August 6 has been made an exception to the rule because it dealt with two subjects that have not been emphasized by previous attorneys general: Soviet disinformation activities and the involvement of communist governments in drug trafficking targeted at the United States.*

Communist active measures strike at the intellectual underpinnings necessary to the rule of law....

As you know, the Soviet Union has chosen to boycott the 1984 Olympics now underway in Los Angeles.... We were especially concerned by reports in the press that the Ku Klux Klan had allegedly mailed threatening and abusive letters to some 20 Asian and African countries planning to take part in the 1984 Olympic Games. We have copies of those letters.

But even more reprehensible than the letters themselves is what we now know about their actual origin. They were not produced or sent by the Ku Klux Klan. They were instead manufactured and mailed by another organization devoted to terror: the KGB....

The damage done in this country by trafficking in drugs is well known in the ruined lives of drug users, the tremendous illicit and untaxed profits generated for criminals, and the violence spawned by users and traffickers. Any coming together of terrorist or insurgent groups and drug-trafficking must be viewed as an extremely serious threat to law and society.

We believe that two foreign governments—Cuba and Bulgaria—have actively used drug-trafficking to assist terrorists. In November 1982 a federal grand jury indicted four high-ranking Cuban officials, nine others, and the alleged Colombian drug trafficker Jaime Guillot-Lara. According to the indictment, the Cuban officials included: a member of the Central Committee of Cuba's Communist Party, who was also president of the Cuban Institute of Friendship with the People; Cuba's ambassador to Colombia; another Cuban diplomat in Colombia; and a Cuban vice-admiral, who was also a member of the Communist Central Committee.... [the evidence] has already resulted in the conviction of five of the defendants....

Just last week, a federal grand jury in Miami indicted 11 persons on drug-trafficking and conspiracy charges involving a major cocaine shipment smuggled into this country via Nicaragua. One of those defendants—Federico Vaughan—has been identified in court documents as an aide to the Sandinista minister of the interior.

The facts alleged in the indictment make it especially hard to believe that these drug smugglers—four of whom are believed to be among the largest smugglers in the world—could have been operating in Nicaragua without active assistance from someone in power in the Sandinista regime.

(Based on article in September *Intelligence Report.*)

### Debate on Use of Chemical, Toxin Weapons

The year 1984 witnessed an intensification of the international discussion on chemical and toxin weapons. On the one hand, the United States stood by its charges that the Soviet Union had provided its Vietnamese clients with trichothecene toxins which they had used against rebellious tribesmen in Laos and Cambodia and that it had used chemical and probably toxin weapons in Afghanistan. It also condemned the use of chemical weapons by Iraq in the Iran-Iraq war. On the other hand, the United States addressed the entire question

frontally and in detail when Vice President Bush, on April 18, presented to the U.N. Disarmament Conference in Geneva the draft of a convention prohibiting the use or possession of chemical weapons as instruments of war.

The use of toxin weapons in Indo-China has been denied by the Soviet government, and the evidence has been attacked as flimsy or non-existent by some scientists in the Western world. However, Mr. Stuart Schwartzstein, a noted expert on chemical and biological warfare, informed a breakfast meeting convened under the auspices of the Committee on Law and National Security on May 14 that after three years' work on the issue, both in and out of government, he had no choice but to conclude that the Soviets and their Vietnamese clients were indeed guilty of the use of chemical and toxin weapons in Southeast Asia. His conclusion rested not only on numerous interviews with the Hmong refugees in Thailand who had been victims of such attacks and on interviews with communist defectors but on the testimony of independent scientists, including a medical commission set up by former Prime Minister Trudeau of Canada.

He noted that Professor Meselson of Harvard University and several other American scientists had challenged the conclusion that Soviet-produced toxin weapons had been used in Laos and Cambodia, arguing that the toxins in question were in fact bee feces. However, no Western scientific personnel familiar with the medical history of the southeastern Asian peoples knew of any incidents of the symptoms manifested by the victims of "yellow rain" that could be attributed to bee feces. The combination of acute symptoms was peculiarly a phenomenon of recent years.

In 1925 at Geneva, under the auspices of the League of Nations, a protocol was signed banning the *use* of chemical and biological weapons as instruments of war. However, the protocol did not contain any provision regarding *possession* of stockpiles, production or research and development of chemical weapons, nor did it contain any provisions for verification of compliance or consultation. For these reasons it left the international community harboring deep suspicions about chemical warfare activities by potentially hostile nations.

In 1972 the U.N. sponsored a convention that extended the Geneva protocol by prohibiting the production, stockpiling or transfer of biological and toxin weapons—but there was still no provision for verification of compliance.

The 66-page draft convention on the prohibition of chemical weapons filed by Vice President Bush differs from previous conventions and protocols in this area in the detailed manner in which it provides for the phased destruction of production facilities, inspection of stockpiles, and on-site verification. It also spelled out the details of an agreement on mutual on-site inspection. It specified that there shall be systematic on-site verification by a consultative committee on chemical weapons and their destruction, and the closure and destruction of chemical weapons production facilities. It stipulated that any request for an on-site inspection must, within 24 hours after receipt of such notification, "provide the inspection team unimpeded access to the location or facility."

Spokesmen for the administration have insisted that details of Bush's draft protocol are negotiable—but only within a framework that would give the United States confidence that the basic provisions of the treaty were being complied with.

(Based on articles in May and July *Intelligence Reports.*)

### Debate on Polygraph Testing

In March 1983, the administration promulgated National Security Decision Directive 84 authorizing the use of the polygraph to determine the source of government leaks of sensitive information and requiring lifetime prepublication review of writings by employees with access to sensitive compartmented information. On February 15, 1984, it was announced that the administration would not press ahead with these programs.

The retreat was a tacit acknowledgment of the fact that there was much congressional opposition to both proposals, even on the part of staunch Republicans. An administration spokesman said that the administration had erred in not preparing the way more carefully for the introduction of the two proposals.

In a belated response to critics of polygraph testing on Capitol Hill, the Department of Defense, in April 1984, produced a sizeable monograph entitled, "The Accuracy and Utility of Polygraph Testing." It is not commonly realized, said the monograph, that there has over the years been a vast improvement in equipment, methodology and investigator training. The use of the polygraph can never supplant a fair trial for the purpose of determining whether a person is guilty or innocent. However, it has proved itself a powerful adjunct to conventional investigation.

What is not commonly realized by the critics is that the polygraph is used regularly by 15 government departments/agencies including the Department of Defense, the Secret Service, the FBI, the CIA, the United States Marshals, and the U.S. Customs Service. These 15 agencies meet regularly at least four times a year in the Federal Interagency Polygraph Committee. The polygraph has been used routinely among other things in the investigation of felony crimes by the Armed Forces investigative services—the Army Criminal Investigative Division, the Naval Investigative Service, and the Air Force Office of Special Investigation. The U.S. Army uses the polygraph in 95 percent of

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its investigations of crimes carrying the maximum penalty of 15 years or more. The Pentagon study notes that the Army during that period of time solved 64.7 percent of its felonies against a national average for the same period of 19.5 percent.

The most common criticism of the polygraph is that it constitutes a massive invasion of privacy. However, blind questionnaires submitted to U.S. Air Force and private industry personnel who had undergone polygraph testing, raise serious questions about the validity of this criticism. By 98 to 99 percent, 1,365 Air Force personnel answered that they were not "offended, embarrassed, humiliated, or degraded in any way" during any part of the examination, nor did they feel that there had been any unwarranted invasion of their privacy. They said that, if they changed jobs and their new employer required a counterintelligence security polygraph examination, they would undergo such an examination. They also said (94.9 percent) that polygraph examinations enhanced the security of their work environment and that they would favor the use of polygraphs in cases of suspected espionage or sabotage (99.2 percent).

(Based on "Book Review," *Intelligence Report,* June 1984.)

### Major Court Decisions Impacting on National Security

*McGehee v. Casey, Slip Opinion No. 81-2233, October 4, 1983.*

McGehee, on being employed by the CIA in 1952, signed a secrecy agreement promising not to divulge classified information obtained by virtue of his employment unless authorized in writing by the CIA to do so. After the CIA censored portions of a manuscript of his, McGehee sought a declaratory judgment that the "CIA classification and censorship scheme violates the first amendment and that, even if the scheme is constitutional, his article contained no properly classified material."

The District Court rejected McGehee's contentions. Judge Wald, who delivered the Circuit Court's opinion, said that "the government has a substantial interest in assuring secrecy in the conduct of foreign intelligence operations," and that "in this case, the CIA properly classified the censored portions of McGehee's article...." (See February *Intelligence Report.*)

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*Steven C. Schlesinger v. CIA, Civil Action No. 82-1749, March 5, 1984.*

The CIA had turned over to the plaintiff 165 responsive documents but refused to turn over 180,000 pages of a "raw file" concerning U.S. involvement in the 1954 Guatemalan coup. The CIA, by affidavit, stated that the documents withheld "would reflect specific and particular intelligence activities...methods utilized...and intelligence sources."

The plaintiff appealed against denial of the documents under FOIA. The court, however, rejected the appeal, stating that "After *in camera* review of the classified affidavit and sample documents, the court agrees with defendant that further public description of the documents and the agency's justifications for withholding them would jeopardize national security interests and is not required." (See May *Intelligence Report.*)

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*Londrigan v. FBI, Slip Opinion No. 83-1101 CADC, December 13, 1983.*

The Privacy Act requester, Joseph P. Londrigan, sought a court order directing the FBI to disclose the identities of the persons who provided information about him during the course of a 1961 background investigation. The district court granted summary judgment for the FBI. The Court of Appeals reversed and remanded, because of faulty presentation by the FBI. After further proceedings, the district court granted summary judgment for Londrigan. The Court of Appeals stated that this *volte-face* was unwarranted. The decision said that "through the submission of affidavits of agents who participated in the Londrigan background investigation, the FBI did all a court could reasonably demand of the Bureau to show the existence of an implied promise that sources' names would be held in confidence." (See April *Intelligence Report.*)